Supreme Court, U.S.
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93-161

No. -

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

AMERICOM DISTRIBUTING CORPORATION,
Petitioner,

v.

ACS COMMUNICATIONS, INC.,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED

1. May liability for price discrimination be imposed only where there is a showing of predatory pricing?

2. May a seller who has otherwise unlawfully discriminated in price escape liability under the cost justification defense where there has been no showing of actual cost savings?

LIST OF PARTIES

The petitioner, Americom Distributing Corporation, was the plaintiff and appellant below. The respondent, ACS Communications, Inc., was the defendant and appellee below.

RULE 29.1 LIST

Neither petitioner nor respondent has any parent or subsidiary corporations.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

AMERICOM DISTRIBUTING CORPORATION,
Petitioner,

v.

ACS COMMUNICATIONS, INC.,
Respondent.

Petitioner Americom Distributing Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 990 F.2d 223 and is reprinted in the Appendix to this Petition.

The decision of the United States District Court for the Northern District of Texas (Belew, District Judge) has not been reported. It is also reprinted in

the Appendix to this Petition.

JURISDICTION

The decision of the Court of Appeals issued on May 6, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Facts

Americom Distributing Corporation ("Americom") is a Texas corporation which distributes headsets used in the telecommunications industry. Its principal supplier during the period relevant hereto was ACS Communications, Inc. ("ACS"), a California manufacturer of headsets, with whom it had a written nonexclusive distribution contract. Prior to April 28, 1986, Americom sold headsets to United Services Automobile Association ("USAA"), a large insurance and financial services company located in San Antonio, Texas, which was by far Americom's largest

customer, accounting for over 80% of its sales. USAA was procured as a customer for ACS's equipment by Americom. The headsets sold to USAA were modified and adapted by Americom and ACS, working together, to conform to USAA's requirements.[1]

During and prior to April 1986, Americom and ACS had a dispute about Americom's creditworthiness. The merits of ACS's claims in that regard were hotly disputed, but for purposes of this Petition, it will be conceded that Americom's credit standing at that time was in jeopardy. On April 28, 1986, ACS, by letter to Clyde Nivens, president of Americom, advised Americom that its distribution

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[1]There was no finding by the district court that the USAA headsets were or were not of like grade and quality with all other headsets sold by ACS. Although unfortunate, the absence of a factual finding on this vital point is not at issue in this Petition.

contract was being "suspended." USAA was advised by ACS of the action it had taken with respect to Americom.

Prior to the suspension of the distributorship contract, a former employee of Americom, Joe Ashmore, and another local businessman, Gary Belcher, approached ACS regarding obtaining a distributorship. On April 28, 1986, Ashmore and Belcher projected headset sales to ACS. Without granting a distributorship, ACS offered to sell headsets to First Comm, the distributor formed by Ashmore and Belcher. Significantly, Ashmore had been instrumental, while employed by Americom, in servicing for Americom the USAA account. During the period of the suspension, ACS continued to ship goods to Americom on a C.O.D. basis, but it did not ship the units which had been specially adapted for use by USAA.

On June 12, 1986, ACS conferred on

First Comm a distributorship by means of an oral contract. On June 13, 1986, ACS reinstated Americom's distributorship. The price quoted by ACS to Americom for the kind of headset being sold to First Comm, which was the same kind of headset sold to Americom prior to April 28, 1986, was $6.17 more than the price being charged to First Comm.[2] ACS claimed that the difference in price was due to First Comm's projected orders, which were thought to be higher than the orders expected from Americom. First Comm's projections, however, were premised on sales to USAA, which ACS and First Comm assumed would be secured by First Comm, rather than Americom.

In other words, Americom was required to quote to USAA its price based

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[2]Americom paid $108.92 each, before April 28, 1986, and after June 13, 1986, while First Comm paid $102.75 for the USAA headsets, a price difference of 6%.

upon the higher price charged for the headsets by ACS, while First Comm could quote its price to USAA based upon the lower price which was charged to it by ACS. ACS assumed, therefore, that First Comm would get the USAA business and based its price to First Comm on that assumption and that First Comm accordingly would qualify for the "large distributor price," while Americom would qualify only for the higher "small distributor price." ACS introduced evidence tending to suggest that its costs, presumably attributable to volume, were lower for sales to large distributors than for sales of the same products to small distributors. Americom lost the business of USAA to First Comm, which continued to be supplied by ACS at the lower price.

The District Court's Opinion and Judgment

An arbitration proceeding was held

before trial at which ACS was held to have breached its distribution contract with Americom, and Americom was awarded about $7,000 in damages. Americom filed suit against ACS and USAA on five theories:

(1) Violation of § 1 of the Sherman Act, 15 U.S.C. § 1;

(2) Violation of § 2(a) of the Clayton Act, 15 U.S.C. § 13(a);

(3) Breach of duty of good faith and fair dealing;

(4) Tortious interference with contract and business relationships; and

(5) Violation of the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code Ann. §§ 1741 et seq. (Vernon 1987).

USAA was dismissed as a defendant before trial, and the common-law claims were dismissed pursuant to a Fed. R. Civ. P. 12(b) motion filed by ACS. The case was tried to the court commencing on March 30, 1992 and concluding on April 2, 1992. On June 26, 1992, the district

court entered its judgment, findings of fact, and conclusions of law. The court adjudged that the plaintiff take nothing. In its opinion, the court relied primarily on Americom's credit problems to deny the relief requested.

The Opinion and Judgment of the Court of Appeals

The Court of Appeals for the Fifth Circuit, after summarizing its review of the facts, affirmed the judgment of the district court. It denied relief to Americom on its claim under § 1 of the Sherman Act on the ground that there had been no showing of concerted conduct, relying on Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984). Furthermore, and although it was not necessary to its decision to do so, the court held (1) that ACS's decision to suspend and later terminate Americom was not unreasonable for purposes of the

Sherman Act, and (2) its decision to do so was both unilateral and vertical in character. The court's decision on Americom's Sherman Act claim is not challenged here.

The court also affirmed the district court's finding of no liability under the Texas Deceptive Trade Practices Act (DTPA) on the ground that Americom's complaint alleged no defect in the goods purchased from ACS, an indispensable element in the court's view for subject matter jurisdiction or standing to bring a claim under the DTPA. Once again, although not necessary for its decision, the court gratuitously concluded that Americom had been treated "fairly" by ACS. Although Americom takes exception to the court's unwarranted and unfounded broadside observations regarding its business, the court's decision on Americom's DTPA claim is not challenged here.

The court affirmed the district court's finding of no liability under the Clayton Act, and it is this finding that cannot be sustained. The court said,

> "A valid Clayton Act claim requires evidence of a predatory price conspiracy. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 595, 106 S. Ct. 1348, 1360, 89 L. Ed. 2d 538, 558 (1986). The Act allows a price differential due to savings in costs of manufacture, delivery, or sale. Texaco Inc. v. Hasbrouck, 496 U.S. 543, 555-56, 110 S. Ct. 2535, 2542-43, 110 L. Ed. 2d 592, 511 (1990)."

American Distributing Corp. v. ACS Communications, Inc., 990 F.2d 223, 227 (5th Cir. 1993). The court apparently confused the requirements for establishing liability for different kinds of claims under the Clayton Act, but in any event, it did not apply the law laid down by this Court in Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 110 S. Ct. 2535 (1990). The relevant portion of the opinion of

the Court of Appeals is quoted in full as follows:

> A violation [of the Clayton Act] involves the predatory price setting while foregoing revenues in order to hamper competition or monopolize the market. Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1256-57 (5th Cir. 1988). The record indicates that First Comm was given a discount because of its larger forecast of orders for the headset, which included orders for other companies other [sic] than just USAA, Americom's only customer for the headset. ACS was impressed with First Comm's credit information and felt that the larger forecast of orders would be fulfilled by the new company. The small price differential was justified by the evidence and this did not cause Americom to go out of business. The appellant's lack of liquidity was its main problem. There is no valid Clayton Act claim here.

Americom Distributing Corp. v. ACS Communications, Inc., supra, 990 F.2d at 227. The district court applied substantially the same rationale for its decision (See Memorandum Opinion, Conclusion

of Law 12, at 12-13).

Basis for Jurisdiction Below

The district court had original jurisdiction over the matter pursuant to 15 U.S.C. § 15. The Court of Appeals exercised its appellate jurisdiction as of right pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Fifth Circuit has decided this case in a way which conflicts with controlling authority of this Court, and thus it is a case appropriate for the granting of the application for the writ pursuant to Sup. Ct. R. 10.1(c). It is precisely the kind of case where this Court has granted writ applications in the past. "Because the case presents an important issue and was decided by the court below in a manner arguably at odds

with prior decisions of this Court, we granted certiorari." Foucha v. Louisiana, 112 S. Ct. 1780, 1783 (1992); see also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019, 2023 (1992); Arizona v. Mauro, 481 U.S. 520, 525 (1987).

Moreover, if allowed to stand, the decision of the Court of Appeals will "threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States[.]" Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 136 (1968). The court of appeals has so narrowly circumscribed the availability of relief for private plaintiffs that the will of Congress, in enacting the Robinson-Patman Act largely for the benefit of small business competitors, will have been thwarted. In so doing,

the Court of Appeals has both misconstrued the plain language of the statute and misapplied controlling authority of this Court. Admittedly the Robinson-Patman Act is a model neither of clarity nor of draftsmanship, nor has it been free from controversy since its enactment, but this Court consistently has made it clear that, until it is amended or repealed, it should be applied as Congress intended and as the Court has mandated.

II. THE COURT OF APPEALS MISCONSTRUED THE REQUIREMENTS FOR IMPOSING LIABILITY UNDER THE STATUTE.

The Court of Appeals said, "A valid Clayton Act claim requires evidence of a predatory price conspiracy." Americom Distributing Corp. v. ACS Communications, Inc., supra, 990 F.2d at 226-27. To the precise contrary, a claim under the Clayton Act, as amended by Robinson-Patman,

and in contradistinction to the Sherman Act, may be established by unilateral conduct, as this Court made abundantly clear in Texaco Inc. v. Hasbrouck, supra. There the Court held that the four elements of proof are as follows: (a) that there were two sales made in interstate commerce; (b) that the commodities sold to them were of like grade and quality; (c) that the seller discriminated in price[3] between the two buyers; and (d) that the discrimination had the prohibited effect on competition. 110 S. Ct. at 2542-43. Additionally, if the plaintiff is to recover damages, he must show the extent of his injury. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981).

There simply is no requirement that

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[3]It is by now axiomatic that a price discrimination means no more than a price difference. FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 547-51 (1960).

there be "evidence of a predatory price conspiracy." To be sure, if such a conspiracy can be proven, both the Sherman and Clayton Acts very probably will have been violated. But to the extent the Court of Appeals required a showing of such a conspiracy for Petitioner to sustain its claim for relief solely under Robinson-Patman, that conclusion flies in the face of the language of the statute and is flatly inconsistent with a recent holding of this Court, which itself is entirely consistent with other authority of years' standing.

A showing of predatory intent will satisfy the requirement that the prohibited effect on competition be shown. In other words, if predatory intent is shown, the effect on competition will be presumed. But that does not mean that predatory intent must be shown to make out a price discrimination claim. In-

deed, as this Court reaffirmed in Hasbrouck:

> In FTC v. Morton Salt Co., 334 U.S. 37, 46-47, 68 S.Ct. 822, 828-829, 92 L.Ed.2d 1196 (1943), we held that an injury to competition may be inferred from evidence that some purchasers had to pay their supplier "substantially more for their goods than their competitors had to pay." See also Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435-436, 103 S.Ct. 1282, 1288-1289, 75 L.Ed.2d 174 (1983).

Texaco Inc. v. Hasbrouck, supra, 110 S. Ct. at 2544. The Court of Appeals and district court decided this case as if FTC v. Morton Salt, 334 U.S. 37 (1943), had never been reported.

How can the result in this case be consistent with the will of Congress? Suppose a very large seller could sell products at lower prices to a particular favored buyer who was much larger than that buyer's disfavored competitor. The effect on competition could well be neg-

ligible in that isolated case where the impact would be felt, if at all, in only a small market. Yet repeated instances of such price discrimination ultimately lead to a much more concentrated market at the buyer's level of competition. Congress intended to nip in the bud precisely this kind of anticompetitive behavior by affording to the first disfavored buyer a remedy unless the seller could affirmatively rebut the presumed effect on competition, 15 U.S.C. § 13(b), or establish its entitlement to claim one of the affirmative defenses as a shield for its conduct.

There may or may not have been predatory pricing here, but it hardly matters for purposes of Petitioner's entitlement to relief. Petitioner demonstrated the proscribed price discrimination, and from that showing, the requisite effect on competition was presumed.

It is abundantly clear that Americom lost its best customer, USAA, to its competitor, First Comm, because of the price discrimination of ACS. Having made that showing, Americom was entitled to recover whatever damages it could prove, unless ACS established its entitlement to one of the affirmative defenses. See Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 921 (5th Cir. 1962) (plaintiff must establish only that it was a competitor of the favored buyer and that plaintiff lost sales as a result of price discrimination); Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 580 (5th Cir.) ("[i]n order to show a violation of Section 2(a) of the Robinson-Patman Act a plaintiff must demonstrate that the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him, the dis-

favored competitor"), cert. denied, 459 U.S. 908 (1982).

III. THE COURT OF APPEALS INCORRECTLY APPLIED THE LAW TO DETERMINE WHETHER RESPONDENT WAS ENTITLED TO CLAIM THE COST JUSTIFICATION DEFENSE.

There are two separate aspects to the finding of the Court of Appeals that ACS was able to claim its entitlement to the cost justification defense. These aspects are conceptually distinct, although the distinction is not clearly articulated in the opinion of the Court of Appeals. The two subissues which arise from these two aspects of the finding will be addressed in turn.

A. Can A Seller, Consistent With The Robinson-Patman Act, Lawfully Discriminate In Price Between Two Buyers, One Of Whom Is More Creditworthy Than The Other?

The law is reasonably clear that Robinson-Patman in general does not preclude a seller from discriminating among

buyers based upon the buyers' respective creditworthiness. See Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 795-99 (4th Cir. 1989); Carlo C. Gelardi Corp. v. Miller Brewing Co., 502 F. Supp. 637 (D.N.J. 1980).[4] If there is to be discrimination, however, it must be on credit terms, not on price. No court has yet held that a seller can decide, because one buyer is more creditworthy than another, to charge the less creditworthy buyer a higher price for goods of like kind and quality. To do so would be entirely counterintuitive: Why should it be more likely that a poor credit risk will pay a higher price than a lower price? Furthermore, the disfavored buyer's competitive position obviously must

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[4]A few district court opinions have held to the contrary. See Cemar, Inc. v. Nissan Motor Corp. in U.S.A., 678 F. Supp. 1091 (D. Del. 1988); Whirlpool Corp. v. U.M.C.O. International Corp., 748 F. Supp. 1557 (S.D. Fla. 1990).

be eroded by paying a higher price than is paid by its competitor. Thus, the seller legitimately can insist on more or stronger assurances of payment from the disfavored buyer, but the seller still may not discriminate in price.

If this were a case where ACS, with a sound objective basis for doing so, sold to First Comm on credit terms but refused to sell to Americom on equally favorable terms or refused to extend credit to Americom at all, then Americom would have no grounds for a claim of price discrimination. But this is not such a case. ACS continued to sell to Americom on a C.O.D. basis headsets other than those adapted for use by USAA. Meanwhile, ACS was willing to sell the USAA headsets to Americom, but only at a

price $6.17 higher[5] than the same price being charged to First Comm, who ACS knew was competing for the same USAA business with Americom. There is no authority to support the allowance of the cost justification defense under these circumstances, and in fact to do so runs directly counter to the intent of the statute.

If ACS was prepared to sell non-USAA headsets to Americom on a C.O.D. basis at the same price that it sold them to all other competing buyers, then it must also sell to Americom the USAA headsets at the same price that it sold them to Americom's competitor, if ACS was to sell them to Americom at all. Americom's creditworthiness (or lack thereof) was no legal justification for price discrimination.

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[5]While the court of appeals characterized the price difference as "small," 990 F.2d at 227, neither it nor the district court found that the price difference was de minimis.

The implicit finding of the Court of Appeals to the contrary cannot be sustained.

B. **Can A Seller Base A Volume Discount On Sales Projections Premised Upon Sales Which The Favored Buyer Will Secure At The Expense Of The Disfavored Buyer As A Result Of The Price Discount?**

The Court of Appeals accepted the argument of ACS that "the difference [in price charged for the USAA headsets] was due to First Comm's expected larger orders in the future and, therefore, ACS's lower cost per unit to ship." Americom Distributing Corp. v. ACS Communications, Inc., supra, 990 F.2d at 225 (emphasis added). The rationale of the Court of Appeals is flawed in at least two material respects. First, the mere fact that one buyer buys in greater quantity than another does not necessarily justify selling to the former at a lower price than to the latter. The whole intent of

Robinson-Patman is to prevent large buyers from extracting price discounts from their suppliers simply because they are large. Unless the price difference is justified in fact by lower costs and the lower price is made available proportionally to all buyers, then the price difference is, ipso facto, discriminatory.

Here, prior to announcing its discriminatory prices, ACS made no effort to justify those prices on the basis of cost, except in the most generalized way, nor was there any attempt made to offer the same opportunity for lower prices on a proportionally equal basis to all buyers.[6] This same Court of Appeals in an earlier case condemned the use of arbitrary price categories which do no more

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[6](Memorandum Opinion, Findings of Fact 19, 22, at 6, 7.) There was no finding of actual costs on the part of ACS, nor was there any determination that the price allowance to First Comm was based on anything but projected sales.

than discriminate in favor of large volume buyers.

> We are of opinion that the quantity discount schedule of defendant and its subsequent classification of its customers into three arbitrary groups was unlawful and discriminatory. It becomes patent that under such system the discounts allowed by defendant to its largest customers were not permissible as being based upon actual differences in the cost of selling its customers or even classes of customers. In effect, they constituted discriminations in price between purchasers of commodities of like grade and quality. Manifestly, the discount system employed was not a good faith effort to devise a method whereby price discounts would be functionally available to all customers.

American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919, 923 (5th Cir. 1951) (footnote omitted).

The second respect in which the analysis of the Court of Appeals is flawed is that ACS based its discriminatory price to First Comm not on the basis

of actual sales but on the basis of projected sales. Moreover, the sales projection of First Comm relied upon by ACS presupposed that First Comm would take the USAA contract away from Americom <u>because</u> First Comm was obtaining a lower quoted price from ACS than was Americom. While it may be true that the USAA sales did not represent a significant portion of total sales of ACS, they represented a significant portion, if not the preponderant portion, of the sales of both Americom and First Comm, and USAA was the largest customer of both. Moreover, First Comm was formed largely to obtain the USAA business, and the USAA headsets were modified to serve the exclusive needs of USAA.

To accept the reasoning of the Court of Appeals is to find that the Robinson-Patman Act endorses the granting of price concessions to a favored buyer premised

on the assumption that the favored buyer will use the discriminatory price to be able to take business away from the disadvantaged buyer. Cost savings, unlike proof of damages, must be based only on actual, not projected sales. See, e.g., Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 386-87 (8th Cir. 1987) (it is enough for the disadvantaged buyer to show that he lost potential customers as a result of the price discrimination). Otherwise, the discriminating seller could always sell to a favored buyer, knowing that the favored buyer could then take away sales from the disadvantaged buyer because of the discriminatory price.

There is nothing in the statute or jurisprudence which would authorize this result, and in fact it flies in the face of precedent well established by this Court. In Hasbrouck, a functional dis-

count case, the Court noted that cases premised on cost justification are much more difficult to prove because "to establish the defense, a 'seller must show that the price reductions given did not exceed the actual cost savings[.]'" Texaco Inc. v. Hasbrouck, supra, 110 S. Ct. at 2545 n.18 (quoting 3 E. Kintner & J. Bauer, Federal Antitrust Law § 23.19 at 366-67 (1983)). There was no such showing here, and in fact there was nothing more than the generalized categorization of buyers into two categories--i.e., "small distributors" and "large distributors"--properly condemned by the Court of Appeals in American Can Co. v. Bruce's Juices, Inc., supra.

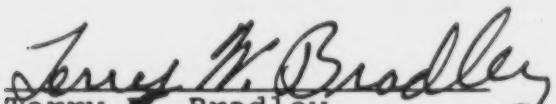
Thus, the decision below was both theoretically unsound and defective as a matter of proof. A reported case like this one will cause commercial parties to reach the unfounded conclusion that price

discrimination unsupported by specific proof of direct cost justification and which is premised merely on sales projections can be sustained in the Fifth Circuit despite the plain language of the statute to the contrary and the clear mandate of this Court regarding how the statute is to be applied. Accordingly, this case merits the Court's careful review and the granting of relief to Petitioner.

CONCLUSION

Thus, and for all the foregoing reasons, the Court should grant the writ of certiorari and set the case down for briefing and argument on the issues herein presented.

Respectfully submitted,



Terry W. Bradley
Counsel of Record

No. -

IN THE
SUPREME COURT OF THE UNITED STATES

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AMERICOM DISTRIBUTING CORPORATION,
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v.

ACS COMMUNICATIONS, INC.,
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Petition for Writ of Certiorari
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for the Fifth Circuit

APPENDIX

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AMERICOM DISTRIBUTING CORPORATION, Plaintiff-Appellant,

v.

ACS COMMUNICATIONS, INC., et al., Defendants.

ACS Communications, Inc., Defendant-Appellee.

No. 92-1782
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

May 6, 1993.

Former exclusive distributor of headsets sued supplier after its distributorship was unilaterally terminated alleging violations of antitrust laws and Texas Deceptive Trade Practices Act. The United States District Court for the Northern District of Texas, David O. Belew, Jr., J., entered take nothing judgment against distributor. Distributor appealed. The Court of Appeals,

Reynaldo G. Garza, Circuit Judge, held that: (1) termination of distributorship agreement was not violation of Sherman Act; (2) discount provided to competing distributor did not violate Clayton Act; and (3) although distributorship had purchased goods from supplier, complaint was not based on any fault with goods but on suspension of distributorship and did not state claim under Texas Deceptive Trade Practices Act.

Affirmed.

Terry W. Bradley, Bradley & Lummus, Cleburne, TX, for appellant.

Michael R. Cooper, Dallas, TX, for appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before REYNALDO G. GARZA, DUHE and EMILIO M. GARZA, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

The appellant, Americom Distributing Corporation ("Americom"), appeals the district court's judgment that they take nothing as to their antitrust and deceptive trade claims against ACS Communications, Inc. ("ACS"). Upon review, we also find that Americom's contentions are meritless and we therefore affirm.

FACTS

Appellant Americom and ACS entered into a non-exclusive distributorship agreement. The agreement provided a limited line of credit to Americom as a new distributor for ACS's products. 80% of Americom's business was the distribution of modified ACS headsets to the United States Automobile Association ("USAA"). Americom provided a $5,000 letter of credit and later a $10,000 letter of credit. The agreement allowed

for the suspension of shipments if payments were to become overdue.

Due to the appellant's credit history, a special method of payment was implemented. Payments on invoices were sent directly by customers to the Rio Vista Bank. The bank would pay ACS and then forward the balance to Americom. By March and April, 1986, $30,000 to $40,000 had become overdue. Some of the bills were unpaid for as much as 90 days. At this time, ACS learned that their special payment arrangement had been canceled by Americom without ACS's knowledge. Americom told ACS that they would be obtaining assistance with their financing from a new company. ACS's repeated requests for financial information on this new company were not responded to until May, 1986. ACS's Regional Sales Manager, Skip Hill, had also heard of complaints by Americom's employees regarding their late com-

pensation and the ongoing reorganization.

ACS had serious doubts about Americom's ability to meet its obligations because of the secret termination of their banking arrangement, the increasingly overdue bills, the scarcity of information about the new source of financing, and the apparent dissension amongst some of Americom's staff. ACS was particularly concerned because the customer, USAA, had requested that their orders for specially modified headsets not be delayed.

On April 28, 1986, ACS wrote a letter to Clyde Nivens, the President of Americom, suspending their account until further notice. ACS did not want to continue extending credit to Americom because of its payment history and their ongoing financial transition. ACS also informed USAA of the suspension because this customer wanted to be notified of any delay in shipments.

Sometime prior to the suspension, a former employee of Americom, Joe Ashmore, and another businessman, Gary Belcher, approached ACS regarding a distributorship. Phil Gattey, Executive Vice President of ACS, stated that he would have to first see the new company's financial information and sales projections. ACS started supplying headsets to First Comm.

In early June, ACS granted a distributorship to the new company based on its satisfactory financial information and superior sales projections. At this time ACS lifted the suspension of Americom and resumed shipping headsets but the cost per unit was $6.17 more than was charged First Comm. ACS claimed that the difference was due to First Comm's expected larger orders in the future and, therefore, ACS's lower cost per unit to ship. Americom's payments again became overdue and their distributorship was

finally canceled in December, 1986.

The parties went to arbitration and it was found that Americom should take nothing against ACS, except for about $7,000 due to the fact that ACS did not ship 200 headsets to Americom that had been agreed to before the suspension. Americom bought suit in federal district court. The court conducted a non-jury trial for the causes of action alleged under the Sherman and Clayton Acts and Texas Deceptive Trade Practices. The court found that Americom's claims lacked merit and that they should not recover anything. Americom filed an appeal on September 9, 1992.

ANALYSIS

I. Sherman Act Claim

The appellant claims that ACS's granting of a distributorship to First Comm and the eventual termination of

Americom as a distributor constituted an unfair restraint of trade in violation of the Sherman Act.[1] Americom also argues that the refusal to ship headsets to Americom during its suspension while ACS was using First Comm, unfairly hindered competition. The appellant's argument fails because there is no evidence of any concerted effort or conspiracy to damage

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[1]The relevant provisions of the Sherman Act state:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .
>
> . . . .
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.
> . . .

Americom's business. "Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775, 783 (1984). Americom was suspended and later terminated solely because of its poor payment habits. The evidence shows that Americom unilaterally dissolved the banking arrangement that ACS had agreed to. The appellant's credit was so weak that it had to turn to another company for financing. A restraint of trade has to be unreasonable for it to violate the Sherman Act. Northwest Stationers v. Pacific Stationery, 472 U.S. 284, 289, 105 S.Ct. 2613, 2616, 86 L.Ed.2d 202, 208 (1985). The suspension and subsequent termination of Americom was sound business policy and

was not unreasonable. The dealing with First Comm was a rational, proper and independent choice. The fact that Americom was allowed to continue working for six months after its suspension, underscores ACS's reasonableness.

The evidence supports the findings of fact by the district court that the suspension and termination of Americom were independent decisions taken by ACS based on sound fiscal policy. The appellant was not terminated because it was price cutting or to limit the competition in favor of the new distributor, First Comm. The termination of a distributor that consistently paid its bills late was not anti-competitive. To continue to allow an entity to pay their invoices at their leisure while rival distributors were held to a much more stricter time frame would have put a restraint on fair competition.

Americom has failed to prove that there was any collusion or anti-competitive motives to ACS's actions. No horizontal conspiracy between competitors or even a vertical agreement between manufacturer and distributor is found here. There is also no demonstration of any price-fixing attempts by ASC or any unreasonable refusal to deal with Americom. There is no valid Sherman Act Claim here. See Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1246-49 (5th Cir.1975).

II. Clayton Act Claim

The appellant contents that the $6.12 discount provided to First Comm and not to them constitutes a violation of the Clayton Act.[2] As already discussed,

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[2]The relevant provision of the Clayton Act states:

Sec. 2. (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either di-

no conspiracy of any sort was proven. A valid Clayton Act claim requires evidence of a predatory price conspiracy. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 595, 106 S.Ct. 1348, 1360, 89 L.Ed.2d 538, 558 (1986). The Act allows a price differential due to savings in costs of manufacture,

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rectly or indirectly, to discriminate between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

delivery, or sale. Texaco Inc. v. Hasbrouck, 496 U.S. 543, 555-56, 110 S.Ct. 2535, 2542-43, 110 L.E.2d 492, 511 (1990).

A violation involves the predatory price setting while foregoing revenues in order to hamper competition or monopolize the market. Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1256-57 (5th Cir.1988). The record indicates that First Comm was given a discount because of its larger forecast of orders for the headset, which included orders for other companies other than just USAA, Americom's only customer for the headset. ACS was impressed with First Comm's credit information and felt that the larger forecast of orders would be fulfilled by the new company. The small price differential was justified by the evidence and this did not cause Americom to go out of business. The ap-

pellant's lack of liquidity was its main problem. There is no valid Clayton Act claim here.

III. Deceptive Trade Practices Act Claim

The appellant argues that they were taken advantage of to a grossly unfair degree by unconscionable acts by ACS in violation of the Texas Deceptive Trade Practices Act ("DTPA"). There are two requirements to be considered a consumer with standing to sue under the DTPA. First the claimant must have purchased goods or services, and secondly, the goods must form the basis of the complaint. Cameron v. Terrell & Garrett, 618 S.W.2d 585, 539 (Tex.1981). The appellants had indeed purchased goods but their complaint is based on the suspension of the distributorship and not with any fault in the goods. The cause of action does not properly come under the

DTPA.

As mentioned earlier, Americom suffered due to its own lack of liquidity. The appellant chose to unilaterally terminate the agreed upon method of payment via the bank. It can only blame itself for its arrears and the need to find new financing through new partners. The new company started by its ex-employee was successful through merit and not a conspiracy with ACS. The appellant was not taken advantage of to any "grossly unfair degree." Chastain v. Koonce, 700 S.W.2d 579, 583 (Tex.1985). The suspension and termination were justified. The price differential was proper given the circumstances. The complaint of unfair treatment and deception must be the producing cause of the injury. Rourke v. Garza, 530 S.W.2d 794, 801 (Tex.1975). The cause of Americom's losses was the fact that 80% of its busi-

ness came from one customer, USAA. This account was only sold ACS headsets and Americom was consistently unsuccessful in paying its bills on time to this all important supplier. There is no evidence of any deceptive causing conspiracy. The district court found correctly that the appellant was treated fairly. The DTPA claim is also meritless.

CONCLUSION

The district court was correct in ruling that Americom should take nothing against ACS. The findings of fact in this case should only be disturbed if after review of the entire record we are convinced that a mistake was committed. Onaway Transp. Co. v. Offshore Tugs, Inc., 695 F.2d 197, 200 (5th Cir.1983). We are not and we therefore

AFFIRM.

U.S. District Court
Northern District of Texas
F I L E D
June 26, 1992
Nancy Doherty, Clerk

By *Bette Browning*
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMERICOM DISTRIBUTING CORPORATION, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4-88-918-K
ACS COMMUNICATIONS, INC., and UNITED STATES AUTOMOBILE ASSOCIATION, Defendants.	§	

MEMORANDUM OPINION

Having considered the evidence, record, and credibility of the witnesses, the Court concludes, for the reasons articulated below, that Plaintiff Americom Distributing Corporation (Americom) shall take nothing by way of its claims against the remaining Defendant, ACS Communications, Inc. (ACS). An antitrust

violation did not occur and ACS did not commit an unconscionable act constituting a violation of the Texas Deceptive Trade Practices Act. The Court enters the following findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules of Civil Procedure.

I. FINDINGS OF FACT

1. Plaintiff Americom is a corporation of the State of Texas.

2. Defendant ACS is a corporation of the State of California. ACS manufactures headsets for use in the telecommunications business. In 1986, ACS sold its products through various distributors throughout the United States, including the State of Texas.

3. Americom brought suit against ACS alleging conspiracies in violation of the Sherman Act, discriminatory pricing in violation of the Clayton Act, and violations of the Texas Deceptive Trade

Practices Act.

4. From March 30 to April 1, 1992, this civil action was tried to the Court without a jury.

5. In 1984, Americom and ACS entered into a valid and enforceable non-exclusive distributorship agreement. Americom was the distributor under the agreement and ACS was the supplier. The agreement provided Americom, a new distributor with an uncertain future, with a limited line of credit against which it was entitled to order ACS products and sell them to the public. At various times during the relationship, Americom provided ACS with letters of credit. Included were an initial $5,000 letter of credit and a subsequent $10,000 letter of credit. The distributorship agreement provided for the suspension of shipments when Americom failed to make timely payments on its ACS credit account.

6. The distributorship agreement was valid and enforceable on April 28, 1986.

7. Due to Americom's credit history and concerns about Americom's ability to pay for its purchases, a method of payment was established in which payments on invoices were sent by the customer directly to Rio Vista Bank. Then the bank paid ACS for the outstanding invoice and remitted the balance of the customer's payment to Americom.

8. In March and April, 1986, Americom's account with ACS was as much as 90 days past due on the majority of shipments. The past due amount totaled as much as $40,000. During this same period ACS learned that Americom unilaterally terminated the payment arrangement with Rio Vista Bank and was trying to establish a relationship with another company that might provide needed financing. ACS

requested updated financial information about the prospective company, but the information was not provided until May, 1986. ACS also had serious reservations about the ability of Clyde Nivens, Americom's President, to control the company and ensure timely delivery to important ACS customers. Consequently, ACS as not able to make credit decisions regarding the Americom account.

9. An agreement for repair of ACS headsets existed between Americom and United Services Automobile Association (USAA). Americom also distributed ACS products to USAA.

10. In mid to late April, 1986, Skip Hill, Regional Sales Manager for ACS, reported that Americom was experiencing problems. Employees were complaining about being paid and the company was apparently reorganizing or refinancing.

11. On April 28, 1986, ACS wrote a letter to Clyde Nivens of Americom indicating that Americom's distributorship was suspended until further notice. The suspension occurred because Americom's account was consistently delinquent, Americom had unilaterally canceled its banking arrangements (established for the express purpose of ensuring payment of Americom's ACS account) with Rio Vista Bank, and had apparently merged with another company for the purpose of obtaining financing. Because Americom was in a state of financial disarray, ACS was of the opinion that it would be a poor business decision to extent further credit. It was also clear that Americom would be demanding increasing shipments and an extensive line of credit in order to effectively serve a large consumer of ACS products such as USAA.

12. Clyde Nivens testified that

Americom's credit problems were irrelevant because Americom did not need credit to continue operating. However, the totality of the evidence fails to support his testimony.

13. Sometime prior to April 28, 1986, ACS was in receipt of an inquiry from Gary Belcher concerning his ability to obtain a distributorship if he formed a new company with Joe Ashmore, a former employee of Americom. Phil Gattey, Executive Vice President of ACS, responded that he would consider a new distributorship only after he had received sufficient information and sales projections.

14. On April 28, 1986, Gattey informed Tom Short, an employee of USAA responsible for implementing a new headset system using ACS products, that ACS had suspended Americom's status as an ACS distributor. That notice was given because Short had requested that ACS notify

them of any potential distribution problems that might interfere with the precise delivery schedule demanded by USAA's system implementation.

15. ACS suspended shipment of its products to Americom for legitimate credit concerns and reasons related to the payment of Americom's account with ACS.

16. In early June, 1986, based upon sales projections and an application verified by listed banking institutions, ACS entered into a distributorship agreement with First Comm, a company founded by Joe Ashmore and Gary Belcher. Through this new distributor, ACS was able to continue distributing headsets to USAA and other Texas customers. This continued distribution was to a large degree attributable to the efforts of Ashmore, the former Americom salesman who had gained the confidence of USAA. Americom

contends that USAA's satisfaction with Ashmore's service evinces the alleged conspiracy. However, proof of conspiracy requires an agreement between ACS, USAA and First Comm that USAA shall deal only First Comm. After reviewing the record, the Court is not persuaded that there was such an agreement. USAA was free to deal with the distributor of its choice and it independently chose to deal with First Comm. USAA had concern for timely delivery of ACS products and determined that First Comm could provide the best service.

17. On June 13, 1986, after receiving sufficient financial information about Americom's new support, a company called Qeamea, ACS reinstated Americom's distributorship. After reinstatement, Americom ordered and sold approximately $20,000 in ACS products. However, it was not long before Americom's account became

seriously past due. In fact, in September, 1986, ACS was forced to call upon the letter of credit that Americom had arranged through its new financial source. Crecia Munson, the ACS Credit Manager, testified at length about the problematic Americom account and Phil Gattey confirmed her testimony in every respect.

18. As a result of the continuing financial problems, ACS terminated Americom's distributorship in December, 1986.

19. After reviewing the forecast contained in First Comm's distributorship application, ACS decided to offer large-distributor pricing to the company. The forecast indicated First Comm could obtain a certain sales level during the ensuing calendar year. The difference between small-distributor and large-distributor pricing resulted from differing manufacturing and shipping costs. Fail-

ure to make such distinctions would seriously hamper ACS's ability to compete with other manufacturers in the industry. ACS limited these price distinctions to volume distributer shipments and did not bind particular distributors to a pricing schedule for the ultimate consumer.

20. ACS did not establish exclusive distributorships and it was common for several distributors to serve the same end user. Albert Butcher, President of ACS, stated that customers could purchase ACS products from any distributor they chose. ACS policy regarding distributors was intended to foster competition, improve service and increase profitability for the distributors, as well as ACS. It was his hope and intention that every distributor was successful.

21. There was no damage to competition resulting from the differing prices at which ACS sold its products to small

distributors as opposed to large distributors.

22. The differing prices were justified in that such differences made only due allowance for differences in the cost of manufacture, sales, or delivery resulting from differing methods or quantities.

23. Americom failed to offer probative evidence establishing an illegal agreement between ACS, USAA and First Comm. Nor was evidence offered to support the allegation that ACS intended to fix the price of its products. Instead, it is quite clear that ACS made an independent decision based on relevant business factors. ACS did not conspire with First Comm, USAA, or any other party for the purpose of retraining trade or refusing to deal with Americom.

24. The actions of ACS in suspending shipments of its products to Americom

on April, 1986 was not a proximate cause of any damages to Americom. The difference in price ACS offered large distributors as opposed to small distributors such as Americom was not a proximate cause of any damage to Americom. Rather, Americom's damages, if any, resulted from its weak financial position and ineffective management.

25. The distributorship agreement by and between ACS and Americom did not represent that it had qualities, rights or obligations which it did not have.

26. ACS did not commit an unconscionable act or course of action toward Americom in connection with its distributorship agreement with Americom.

27. Any Conclusion of Law deemed a Finding of Fact is hereby adopted.

II. CONCLUSIONS OF LAW

Plaintiff's Sherman Act Claim

1. Plaintiff seeks relief under section 1 of the Sherman Antitrust Act for anticompetitive activities of ACS in the "headset market." 15 U.S.C. § 1. Section 1 provides in part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .." Id. Section 1 was "intended to prohibit any unreasonable restraints of trade." Business Elec. v. Sharp Elec. Corp., 485 U.S. 717, 723 (1988). (emphasis added).

2. In distributor termination cases the Supreme Court distinguishes concerted action from independent action of the manufacturer. Business Elec. v. Sharp Elec. Corp., 780 F.2d 1212, 1217 (5th Cir. 1986), aff'd, 485 U.S. 717 (1988).

Absent violation of the antitrust laws, a supplier acting independently is free to terminate its distributor for failure to comply with the supplier's policy. United States v. Colgate & Co., 250 U.S. 300, 307 (1919). Concerted action involving "non-price" restrictions are not per se illegal and are evaluated under the "rule of reason." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

3. "Ordinarily, whether [a] particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason--that is, 'the factfinder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" Business Elec., 485 U.S. at 723. See Chicago Bd. of Trade v. United States,

246 U.S. 231, 238 (1918) (most frequently cited statement of the rule of reason). This is because virtually every business combination restrains trade. Jayco Sys. v. Savin Business Mach. Corp., 777 F.2d 306, 316-17 (5th Cir. 1985).

4. The rule of reason focuses upon the Defendant's business objectives and determines whether those objectives promote or suppress competition. National Soc'y of Professional Eng'r v. United States, 98 S. Ct. 1355, 1363 (1978). The Court's role is to "ensure that legitimate conduct on the part of the manufacturers and distributors would not be penalized due to ambiguity of the legal rule." Business Elec., 780 F.2d at 1217.

5. To establish liability under section 1, Americom must prove that a price maintenance agreement exists. Business Elec., 780 F.2d at 1217-18. Plaintiff must show that the remaining

distributors are not making independent pricing decisions. Monsanto Co., 465 U.S. at 763. The Fifth Circuit explained the analysis as follows:

> [I]n order for a manufacturer's termination of a distributor to be illegal per se, it must be pursuant to a price maintenance agreement with another distributor. That distributor must expressly or impliedly agree to set its prices at some level, though not a specific one. The distributor cannot retain complete freedom to set whatever price it chooses.

Business Elec., 780 F.2d at 1218. The critical issue is the existence of a price maintenance agreement between the manufacturer and the remaining distributor.

6. In Aladdin Oil Co. v. Texaco, Inc., the Fifth Circuit held that preventing the plaintiff from acquiring a competing distributorship did not alone violate the antitrust laws. 603 F.2d 1107, 1116-17 (5th Cir. 1979). Absent

evidence of an illegal price maintenance agreement, mere "lessening of intraband competition is not enough." Id.

7. The Supreme Court has made it clear that "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." Monsanto Co., 465 U.S. at 764. "[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Id. (quoting Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981). Absent such evidence, a manufacturer has a right to deal with whomever it chooses, as long as it makes the decision to deal independently. Colgate, 250 U.S. at 307.

8. Against this legal background, none of the evidence before the Court suggests a finding other than that ACS independently chose to terminate its distributor for valid business reasons. There is no indication that Defendant imposed an agreement upon its remaining distributor or that competition within the relevant market suffers as a result. Furthermore, the facts do not support Plaintiff's attempt to characterize this case as one involving a concerted refusal to deal. See generally FTC v. Indiana Fed'n of Dentists, 106 S. Ct. 2009 (1986); Northwest Wholesale Stationers v. Pacific Stationary and Printing Co., 472 U.S. 284 (1985). ACS representatives testified that it was in the company's best interest to maintain and encourage multiple distributors in the same market. ACS's attempts to approve Americom's alternative credit supports that testimony.

Accordingly, the Court finds that ACS's actions did not violate section 1 of the Sherman Act.

Plaintiff's Clayton Act Claim

9. Americom also claims that ACS sold headsets in the relevant market at prices lower than charged to Americom in order to eliminate Americom as a competitor in the headset market. According to Americom, this was an unlawful price discrimination in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. § 13(a).

10. Section 2(a) prohibits "discrimination in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 13(a). To establish a violation

of the Act, Americom had the burden of proving four facts: (1) that ACS's sales to First Comm were made in interstate commerce; (2) that the products sold to First Comm were of the same grade and quality as that sold to Americom; (3) that ACS discriminated in price between First Comm and Americom; and (4) that the discrimination had a prohibited effect on competition. See Texaco, Inc. v. Hasbrouck, 110 L.Ed.2d 492, 511 (1990).

11. Section 2(a) of the Act also provides, in part: "[t]hat nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Texaco, Inc., 110 L.Ed.2d at 511. The Act also provides a good faith response to the equally low

price of a competitor. Id.

12. Americom's burden is to prove that ACS's pricing was "predatory." Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1257 (5th Cir. 1988). That burden requires much more than merely alleging Plaintiff varied its prices between different distributors. Id. It is not enough to show "a mere diversion of business from one competitor to another." Instead, Plaintiff must present evidence indicating that ACS "sacrificed present revenues for the purpose of driving [Americom] out of the market." International Air v. American Excelsior Co., 517 F.2d 714, 721-23 (5th Cir. 1975).

13. At trial, ACS admitted that it sold its product to First Comm at a price lower than previously available to Americom. However, Americom failed to present evidence indicating that the price dif-

ferential was an attempt to monopolize or reduce competition within the meaning of the Act. In fact, ACS representatives testified that the lower price was the result of a standard cost adjustment offered to all distributors expected to sell large volumes of merchandise that decrease ACS's production and delivery costs. Based on its summary of prospective clients, First Comm was able to obtain the large-volume discount. Because the Robinson-Patman Act only prohibits price discrimination having an anti-competitive effect arising out of predatory practices, the Court finds that Americom's Clayton Act claims are without merit.

Plaintiff's Deceptive Trade Practices Act Claim

14. Americom also alleges that ACS's conduct was unconscionable and, thus, it violated the Texas Deceptive

Trade Practices Act (DTPA). Tex. Bus. & Com. Code Ann. § 17.41 et. seq. (West 1992). ACS responds that there was no evidence to show that it engaged in the alleged unconscionable conduct.

15. To prevail under the DTPA, a plaintiff must establish all of the elements set forth in section 17.50: (1) the plaintiff must be a consumer; (2) the act complained of must be a producing cause of actual damages; and (3) the act must be one of those prohibited by section 17.50(a). MacDonald v. Texaco, Inc., 713 S.W.2d 203, 205 (Tex. App.--Corpus Christi 1986).

16. It is well-settled that Plaintiff is a "consumer" within the meaning of the statute. Big H. Auto Auction, Inc. v. Saenz Motors, 665 S.W.2d 756, 758-59 (Tex. 1984) (purchasing goods for resale fulfills the statutory consumer requirement).

17. Plaintiff's burden is to prove that ACS "committed false, misleading, or deceptive acts which were a producing cause of actual damages." Southwestern Bell Media, Inc. v. Lyles, 825 S.W.2d 488, 496 (Tex. App.--Houston [1st Dist.] 1992). A producing cause is one that is "an efficient, exciting, or contributing cause, which in a natural sequence, produces the injuries or damages complained of." Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975).

18. Under the DTPA, an "unconscionable" act or practice is one that "takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree." Griffith v. Porter, 817 S.W.2d 131, 136 (Tex. App.--Tyler 1991) (citing DTPA § 17.45(5)). The definition requires Plaintiff to prove that the act or practice occurred to a gross degree. Chas-

tain v. Koonce, 700 S.W.2d 579, 583 (Tex. 1985). "Gross" is defined as "glaringly noticeable, flagrant, complete and unmitigated." Id.

19. Allegations supporting a mere breach of contract, without more, are not enough to constitute a DTPA violation. Dura-Wood Treating v. Century Forest Indus., 675 F.2d 745, 755-56 (5th Cir. 1982).

20. After considering the totality of the circumstances surrounding the conduct of ACS and the allegations of the Plaintiff, the Court is not persuaded that a DTPA violation occurred. Americom alleges that ACS acted in an unconscionable predatory manner. Specifically, it points to the unconscionable acts of Phil Gattey, Albert Butcher, Skip Hill and Crecia Munson. Each of the acts allegedly involve the same plan, scheme or agreement giving rise to the antitrust

violations discussed above. The Court does not find that there was such an agreement. The Court does not find that ACS's actions were a producing cause of Americom's ultimate demise. Also, the alleged acts generally involve claims constituting breach of the distributorship agreement. While Americom's allegations might result in an actionable breach of contract claim, they do rise to the level of gross conduct contemplated by the DTPA.

21. Any finding of fact deemed a conclusion of law is hereby adopted.

The Court's Judgment in conformance with this Memorandum Opinion, shall be entered this same date.

SIGNED this 26th day of June, 1992.

David O. Belew Jr.
DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

STATUTE INVOLVED

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in pertinent part as follows:

> § 13. Discrimination in price, services, or facilities--Price; selection of customers
>
> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimnation are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein

contained shall prevent differentials which make only due allowances for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered[.]

Supreme Court, U.S.
FILED
AUG 24 1993
OFFICE OF THE CLERK

No. 93-161

In The

Supreme Court of the United States

October Term, 1993

AMERICOM DISTRIBUTING CORPORATION,

Petitioner,

v.

ACS COMMUNICATIONS, INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States District Court and the United States Court of Appeals err in requiring a showing of predatory pricing in order to make a valid claim under Sec. 2(a) of the Clayton Act as amended by the Robinson Patman Act (15 U.S.C. § 13(a))?

2. Did the United States District Court and the United States Court of Appeals correctly rule that the Appellee, ACS Communications, Inc., established a valid defense to the Appellant, Americom Distributing Corporation, Inc.'s Clayton Act claim by showing the price differentials charged to different distributors for its headsets made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ?

PARTIES TO PROCEEDING

The Petitioner, Americom Distributing Corporation, Inc., a Texas corporation, was the Plaintiff and Appellant below.

The Respondent, ACS Communications, Inc., a California corporation, was the Defendant and Appellee below.

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Americom Distributing Corporation v. ACS Communications, Inc., 990 F.2d 223 (5th Cir. 1993), petition for cert. filed. (See Appendix to Petition for Writ of Certiorari)

American Distributing Corporation v. ACS Communications, Inc., No. 4-88-2918OK (N.D. Tex. June 26, 1992). (See Appendix to Petition for Writ of Certiorari)

JURISDICTION

The United States District Court had original jurisdiction over the matter pursuant to 15 U.S.C. § 15. The Court of Appeals exercised its appellate jurisdiction as of right pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Section 2(a) of the Clayton Act as amended by the Robinson Patman Act (15 U.S.C. § 13(a). *See* Appendix to Petition for Writ of Certiorari

STATEMENT OF THE CASE

Respondent, ACS Communications, Inc., a California corporation ("ACS") is a manufacturer of headsets used in the telecommunication business. In 1986, ACS sold its headsets through various distributors throughout the

United States and in the State of Texas. Petitioner, Americom Distributing Corporation, a Texas corporation ("Americom"), was one of ACS' distributors of headsets.

In June, 1986, ACS entered into a new distributorship arrangement with FirstCom, Inc., a Texas corporation ("FirstCom"). Based upon sales forecast provided by FirstCom as well as other supporting and financial information relevant to FirstCom's sales, which led ACS to reasonably conclude that FirstCom could achieve that level of sales which would qualify it for large distributor pricing (Finding of Fact No. 19), ACS agreed to sell certain of its headsets to FirstCom at large distributor pricing. Such price was less than the price ACS sold its headsets to smaller volume distributors. The difference between the price afforded to small volume distributors and large volume distributors was not an arbitrary distinction or categorization, but rather was based upon differing manufacturing and shipping costs that experience and studies had shown ACS were incurred in the manufacturing and shipping process. Such price differentials made only due allowances for difference in the cost to manufacture, sale or delivery resulting from the different methods or quantities in which such commodities were sold to various distributors.

It was the position of Americom that such price differentials constituted a violation of Sec. 2(a) of the Clayton Act as amended by the Robinson Patman Act (15 U.S.C. § 13(a)). It was the contention of ACS that its price differentials were justified by the provisions of Sec. 2(a) of the Clayton Act and that such differentials gave only due allowance for differences in the costs of manufacture,

sale or delivery resulting from the different methods or quantities in which its headsets were sold.

The case was tried in the United States District Court for the Northern District of Texas commencing on March 30, 1992, and Concluding on April 2, 1992. On June 26, 1992, the District Court entered its Judgment, Findings of Fact and Conclusions of Law and held that the Plaintiff take nothing by its suit. Specifically, with respect to Americom's claims under Sec. 2(a) of the Clayton Act, the District Court found that ACS offered large distributor pricing to FirstCom based upon FirstCom's sales forecast, and supporting financial information which led it to believe FirstCom could achieve the volumes necessary for large distributor pricing. The difference between small distributor pricing and large distributor pricing resulted from differing manufacturing and shipping costs (Findings of Fact No. 19). The court further found that such pricing was justified in that such differences made only due allowance for differences in the cost of manufacture, sales or delivery resulting from different methods or quantities in which the products were sold (Finding of Fact No. 22). The District Court further found that such price differential was not a proximate cause of damage to Americom, but that its damages, if any, resulted from weak financial position and ineffective management. (Finding of Fact No. 24).

Based upon its fact findings the District Court concluded ACS' lower price to FirstCom was the result of a standard cost adjustment offered to all distributors expected to sell large volumes of merchandise that decreased ACS's production and delivery cost. It further concluded that ACS's pricing was not predatory and that

Americom had failed to introduce any evidence or proof that the price differential was an attempt to reduce competition within the meaning of the Act. [Conclusions of Law 9 through 13].

Based upon its findings and conclusions of law the Court entered a take nothing judgment in favor of ACS.

The Court of Appeals affirmed the judgment of the District Court finding no evidence of predatory pricing and that the price differential was justified by the evidence.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. Petitioner's request for a writ of certiorari should be denied because the Fifth Circuit followed sound established precedent in requiring the showing of injury to competition evidenced by predatory pricing in order to establish a claim under Sec. 2(a) of the Clayton Act.

2. Petitioner's request for a writ of certiorari should be denied because ACS established a valid defense to its differential pricing under Sec. 2(a) of the Clayton Act in that the evidence and the findings of the trial court established that its price differentials made only due allowance for differences in the cost to manufacture, sale or delivery resulting from the different methods or quantities in which its headsets were sold to distributors.

ARGUMENT AND AUTHORITIES SUPPORTING REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS CORRECTLY RULED THAT IN ORDER TO SHOW A VALID CLAIM UNDER SEC. 2(a) OF THE CLAYTON ACT, AS AMENDED BY THE ROBINSON PATMAN ACT (15 U.S.C. § 13(a) IT WAS INCUMBENT UPON AMERICOM TO SHOW PREDATORY PRICING.

The Fifth Circuit Court of Appeals and the District Court were correct in requiring a showing of predatory pricing in order to make a case under Section 2(a) of the Clayton Act. It has long been held that in order to make a Clayton Act claim one must show a substantial effect on competition, not merely upon the competitors. *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 721-23 (5th Cir. 1975). In order to show damage to competition as opposed to simply damage to a competitor, it is incumbent upon the Plaintiff in a Clayton Act Case to show "predatory behavior, i.e. the Defendant sacrificed present revenues for the purpose of driving a plaintiff out of the market." *Stitz Spark Plug Co. v. Champion Spark Plug Co.*, 480 F.2d 1253, 1256-57 (5th Cir. 1988).

Americom's reliance upon *FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S. Ct. 822, 92 L. Ed. 2d 1196 (1943) is misplaced. Under *Morton Salt* in order to have an inference of injury to competition, it is necessary to show that a manufacturer sells goods *over time* to some customers at a *substantially lower price* than to competitors of those customers (emphasis supplied). There is simply no evidence in the case before the Court that the price at which ACS sold certain of its headsets to FirstCom was substantially

lower than what it sold said headsets to Americom. The evidence further establishes that such sales occurred over a very limited period of time. (*See* Findings of Fact No's 19 and 22 and Conclusion of Law 13). Although it is true under *Morton Salt* that where it is found that a manufacturer sells goods at a substantially lower price over time, and "such differentials resulted in price differentials between competing purchasers sufficient in amount to influence their resale price" there can be a presumption of injury to competition.

First, there was no evidence in the case before the court that the price differentials in this case were sufficient to influence the resale price of the headsets by Americom to its potential customers. In fact, the evidence with respect to one of its major customers, United Services Automobile Association, was to the contrary that it did not affect the resale price of headsets sold or quoted to United Services Automobile Association by Americom.

Further, such presumption is a rebuttable presumption. See *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435-436, 103 S. Ct. 1282, 1288, 1289, 75 L. Ed. 2d 174 (1983). The fact findings by the Court in this case (Finding of Fact No. 24) clearly rebutted the presumption in this case in that the Court found that the differential in prices in this case was not a proximate cause of any damages to Americom. Rather, Americom's damages, if any, resulted from its weak financial position and ineffective management.

II.

THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS CORRECTLY HELD THAT ACS ESTABLISHED A VALID DEFENSE TO ITS DIFFERENTIAL IN PRICING UNDER SEC. 2 (a) OF THE CLAYTON ACT IN THAT THE EVIDENCE ESTABLISHED SUCH PRICE DIFFERENTIALS ONLY MADE DUE ALLOWANCE FOR DIFFERENCES IN THE COST OF MANUFACTURE, SALE OR DELIVERY RESULTING FROM THE DIFFERING METHODS OR QUANTITIES IN WHICH SUCH COMMODITIES WERE SOLD TO PURCHASERS.

Sec. 2(a) of the Clayton Antitrust Act as amended by the Robinson Patman Act (15 U.S.C. § 13(a)) provides in relevant part as follows:

> . . . provided that nothing herein contained shall prevent differentials which make only due allowance in the costs to manufacture, sell or deliver resulting from the differing methods or quantities which commodities are to such purchasers sold or delivered.

Findings of Fact No's. 19 through 22 and Conclusion of Law No. 13 clearly established that the differentials in price that ACS sold its products to FirstCom as opposed to Americom for, only made due allowance for differences in the cost of manufacturing, sale or delivery resulting from differing methods of quantities in which such headsets were sold.

The testimony of Phil Gattey, a Vice President of ACS, clearly explained the reason for the large distributor vs. small distributor pricing and established it was not an arbitrary division but that such differentials in pricing were based solely upon the cost differences incurred in

the manufacturing and handling of small volume sales vs. large volume sales. The testimony of Al Butcher, the President and Chief Executive Officer of ACS, clearly showed through exhibits admitted into evidence the price differentials which were incurred in shipping, handling and inventory stocking in handling large distributors vs. small distributors. Such cost differentials were shown to equal the price differentials that were charged to First-Com as opposed to Americom in the sale of certain of ACS' headsets.

The type of testimony and evidence introduced in the case at bar was similar to that produced in *American Motors Corporation v. FTC*, 384 F.2d 247 (6th Cir. 1967).

American's claims in its petition that the difference in price for certain of ACS headsets charged to FirstCom as opposed to Americom was based upon creditor considerations is completely without factual basis. The testimony and evidence with respect to the price differentials that was introduced at trial had solely to do with the difference in the cost of manufacturing, stocking and shipping incurred in shipping the large volume distributors vs. small volume. Further, Americom's reliance on *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951) is clearly misstated. It is clear that the division made by ACS between large volume pricing and small volume pricing was not an arbitrary division but was made upon studies and costs incurred in the difference in costs to manufacture and ship products on a large volume basis vs. a small volume basis. *Rose Confections v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987) simply does not support the proposition that petitioner quotes it for.

CONCLUSION

ACS requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1993

AMERICOM DISTRIBUTING CORPORATION,
Petitioner

v.

ACS COMMUNICATIONS, INC.,
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENTS FIRST RAISED IN BRIEF IN OPPOSITION

1. Does a disfavored buyer's willingness to resell goods of like kind and quality at a resale price competitive with that charged by his favored competitor who receives the benefit of a discriminatory price preclude the disfavored buyer from obtaining relief under the Robinson-Patman Act?

2. Can the cost justification defense be employed when the purported cost savings are not related directly to the sales which are at issue?

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IN THE
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Respondent

Petitioner Americom Distributing Corporation respectfully offers this Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

I. A DISFAVORED BUYER'S WILLINGNESS TO RESELL GOODS OF LIKE KIND AND QUALITY AT A RESALE PRICE COMPETITIVE WITH THAT CHARGED BY HIS FAVORED COMPETITOR WHO RECEIVES THE BENEFIT OF A DISCRIMINATORY PRICE DOES NOT PRECLUDE THE DISFAVORED BUYER FROM OBTAINING RELIEF UNDER THE ROBINSON-PATMAN ACT.

The only reason FirstCom was able to forecast sales which would legitimize

ACS's granting to it "large distributor pricing" was the assumption that FirstCom, by obtaining the USAA account, would qualify for that price. Without the sales of product to USAA, FirstCom would never have qualified for any volume discounts, even by the contrived standards of ACS. Thus, by projecting that FirstCom could take the USAA account away from Americom, FirstCom could justify receiving a volume discount price. In a self-fulfilling prophecy, FirstCom could formulate its projections, knowing it would in fact acquire the USAA account because FirstCom would have the benefit of a lower price.

The USAA headsets, which provided the bulk of the sales volume of both Americom and FirstCom, were specially adapted. Neither Americom nor FirstCom could have qualified for the volume dis-

count without obtaining the USAA contract. Because ACS granted the discount price to FirstCom, largely due to its assessment of Americom's poor credit, it was foreordained that only FirstCom would qualify for the discount. The very price discrimination which is at issue in this case stacked the deck against Americom and guaranteed that FirstCom would become the only party eligible for discount. Any suggestion that ACS was neutral in deciding to award to FirstCom the low price is misleading.

That Americom accepted a lower profit margin in the resale prices of headsets does not preclude it from obtaining relief.

> [W]here the record indicates a price differential substantial enough to cut into the purchaser's profit margin and discloses a reduction which would afford the favored buyer a significant aggregate savings that, if reflected in a resale

> price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may properly be indulged. It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give him a substantial advantage over his competition.

Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir. 1965) (footnote omitted). ACS's argument to the contrary is without merit.

II. THE COST JUSTIFICATION DEFENSE CANNOT BE EMPLOYED WHEN THE PURPORTED COST SAVINGS ARE NOT RELATED DIRECTLY TO THE SALES WHICH ARE AT ISSUE.

ACS argues on the one hand that the higher price charged to Americom was not substantially higher than that charged to

FirstCom, but yet it was still justified by differences in ACS's costs. As the Court accurately observed in FTC v. Morton Salt Co., 334 U.S. 37, 48-49 (1943), there is no such thing as a small price discrimination in absolute terms. A price difference of 5% in some markets can have a greater effect than a price difference of 20% in another market. A price difference is discriminatory if it adversely affects competition.

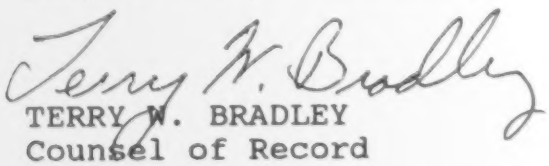
ACS had two price levels: one for large distributors and one for small distributors. Its proof tended to show only that, in the aggregate, its costs were lower in distributing goods to large quantity buyers than to small quantity buyers. The very argument strikes at the heart of the evil Robinson-Patman aims to redress in a primary line case: the ability of large quantity buyers to ob-

tain discount prices solely by virtue of their size. The fact that delivery in carload lots may have been less expensive in the aggregate for a seller of salt to distribute than non-carload lots does "not tend to disprove injury to the merchant compelled to pay the less-than-carload price." Id. at 48. ACS did not, and could not, demonstrate how these particular discriminatory prices were cost-justified. The fact that ACS preferred to sell in large quantities generally is beside the point.

CONCLUSION

Thus, and for all the foregoing reasons, the Court should grant the writ of certiorari and set the case down for briefing and argument on the issues herein presented.

Respectfully submitted,



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